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No. 89-1075

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**A.A. POULTRY FARMS, INC.,**
**BOOMSMA PRODUCE, INC.,**
**BOOMSMA PRODUCE OF MISSOURI, INC.,**
**GRESSEL PRODUCE CO., INC.,**
**HEMMELGARN & SONS, INC.,**
**MENDELSON EGG CO. OF WEST UNITY,**
**a/k/a MENDELSON EGG CO.,**
**PETER PRODUCE, INC.,**

*Petitioners,*

-VS.-

**ROSE ACRE FARMS, INC.,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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> It is unfortunate but true that the standards by which a defendant's alleged predation will be judged vary greatly at this time depending on the circuit in which it happens to be sued.
>
> —Wall, *Predatory Pricing: Are Cost Tests On The Way Out?*, 4 Antitrust 40, 43 (Fall/Winter 1989) (discussing this case)

Failing to review the decision below would leave the Robinson-Patman Act buried in confusion—virtually unavailable to competing sellers or to anyone dealing in perishable products. The Act would be interpreted and applied not by its express terms, or its congressional purpose of catching the "weed in the seed,"[1] but by a hostile philosophy. Rose Acre's opposition to certiorari has three major flaws: (1) No potential litigant can review this "precedent" and know with any reliability what constitutes harm to competition under the Robinson-Patman Act, what he must prove about market characteristics, including whether a case must pass through the monopolistic recoupment "filter," and whether any evidence of actual predatory intent or below-cost sales is even relevant. However, the litigant can be sure that the standards *and* result will depend on which circuit is chosen as the forum. (2) The decision eviscerates the Robinson-Patman Act by making it largely unavailable to sellers of perishable products, thus eliminating coverage for much of the

[1] *See* Pet. at 12. The Petition for Certiorari will be cited as "Pet." and Respondent's Brief in Opposition as "Opp." References to the opinion below are to Appendix A to the Petition for Certiorari. Petitioners' Rule 29.1 list is contained in the Petition for Certiorari. (Pet. at ii).

grocery/food industry the Act was intended to protect. (3) Rose Acre's assertions about "fact-sensitive" issues, threatening this Court with the specter of sorting through boxes of records, correctly admit that "both" courts below made "de novo" "evidentiary assessments" and "evidentiary determinations," usurping the jury's verdict and function. (Opp. at 13). However, Rose Acre incorrectly and self-servingly assumes that this Court is being asked, or needs, to do the same.

1. **Conflicts and The Recoupment Standard.** Rose Acre's Opposition illustrates that, under any interpretation of the decision below, there is an unavoidable basic conflict among the circuits with respect to what proof of actual or likely antitrust injury is required under the Robinson-Patman Act. A fundamental issue is whether the injury to competition standard under the Robinson-Patman Act in a primary-line case is the same as under § 2 of the Sherman Act. Rose Acre contends that while the Seventh Circuit commended monopolistic recoupment as the threshold requirement for predatory pricing and condemned other approaches as doing "a great disservice to customers" (A-15), it nonetheless limited a monopolistic recoupment test to § 2 of the Sherman Act. However, Rose Acre's interpretation simply realigns the conflicts, placing the Seventh Circuit in conflict with, for example, the Eighth Circuit. Thus the Seventh Circuit opinion acknowledges that "several courts of appeals" have explicitly ruled that "the standard of primary-line liability under the Robinson-Patman Act should be the same as that under § 2 of the Sherman Act" (A-16), citing *inter alia*, the Eighth Circuit's Robinson-Patman Act decision in *Henry v. Chloride, Inc.*, 809 F.2d 1344, 1345 (8th Cir. 1987).

The conflicts are aptly demonstrated when Rose Acre asserts that there is no "chaos" in "the lower courts re-

garding either the meaning or effect of the *Matsushita*[2] economic plausibility requirement" (Opp. at 23), *i.e.*, a monopolistic recoupment standard. Rose Acre bases that erroneous proposition on *Henry v. Chloride, Inc.*, *supra*, which is one of the circuit court cases that has applied a monopolistic recoupment test *in a Robinson-Patman Act case*. Thus Rose Acre argues:

> As the Eighth Circuit has succinctly stated: "In essence, *Matsushita* imports a rule of impossibility into predatory pricing cases: if the defendant could not have captured the market, its conduct cannot be predatory, no matter what its 'intent.'" *Henry v. Chloride, Inc.* . . . . *And that is exactly how Matsushita has been uniformly applied both in the Seventh Circuit and in every other circuit in which the issue has arisen.*

(Opp. at 23) (emphasis added). That closing sentence implicitly recognizes that the monopolistic recoupment standard in fact governed the present case, but, if that is incorrect as Rose Acre elsewhere argues, then the conflict is between cases such as the present one and Robinson-Patman cases such as *Henry v. Chloride, Inc.*

It is also important to recognize that even a decision to apply *Matsushita's* principles to this case does not produce a judgment for Rose Acre or sustain the judgment n.o.v. The court below was not, as Rose Acre implies, "merely" following *Matsushita*. (Opp. at 9, 16, 22-23). In *Matsushita* this Court addressed an alleged conspiracy to charge prices "below the market level," *not* necessarily below costs. 475 U.S. at 584 & n.8. The majority noted that the expert's report relating to below-cost pricing was based on "assumptions" without "actual cost data" and

[2] *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

therefore found the trial judge's exclusion of that "persuasive," but the four dissenters concluded the below-cost pricing evidence was admissible and should have gone to a jury. *Id.* at 594 n.19, 606. Both the *Matsushita* majority and dissent considered that admissible cost evidence would be relevant. The majority even noted that proof of below-cost pricing would *negate* a "strong inference" that the pricing conduct was not "rational." *Id.* at 585 n.9. Judge Easterbrook turns that upside down by making monopolistic recoupment into an "initial hurdle" or prerequisite, which if not passed, is "*to cut the inquiry off at the pass*" and to make irrelevant both "inquir[y] into the relation between price and cost" and "questions of intent." (A-10) (emphasis added). Thus, while *Matsushita* was decided on summary judgment with no admissible evidence of below-cost pricing to show predatory conduct, in sharp contrast this case was heard by a jury presented with extensive evidence of below-cost pricing.

It blinks at reality to deny that the entire opinion below (including the issues discussed in Sections 2 and 3 below) was driven by the panel's strong view that the "best feasible test for predatory pricing cases" (A-16) was monopolistic recoupment and that "*to penalize [Rose Acre which it believed could not recoup losses from discriminatory prices] in the name of antitrust would do a great disservice to customers.*" (A-15) (emphasis added). The opinion avoids candidly pitting its view of economic "justice" against the Robinson-Patman Act but instead criticizes *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), as a "friend-less," disdained, and inferior rule inducing "civil disobedience in the judiciary." (A-16). No potential claimant in the Seventh Circuit can now initiate a primary-line Robinson-Patman Act case with a realistic hope of surviving the hurdles that will be encountered unless the defendant has the present market power (about

a 30% or higher share) (A-14) needed to pass the monopolistic recoupment test.

The Act was designed to attack *incipient* market concentrations. Pre-term concentrations (those that are developing but have not yet reached fruition) will not suffice if monopolistic recoupment is the exclusive threshold "filter." By holding a Robinson-Patman plaintiff to a standard impossible to meet, a recoupment "filter" predetermines the outcome. This case illustrates the point, for, by 1989, Rose Acre's post-trial production had reportedly grown to 10 million birds—dwarfing virtually all competitors.[3]

**2. Perishability Consumes The Statute.** Rose Acre barely addresses the petitioners' issue II—the Seventh Circuit's presumption that physically identical goods are not of like grade and quality if they are perishable. Rose Acre calls the issue "fact-sensitive" (Opp. at 26) when in reality it is a legal issue of great importance to the continued viability of the Robinson-Patman Act and the utility of the statute to the agricultural and grocery industry. Contrary to Rose Acre's arguments, the Seventh Circuit folded together the concepts of "like grade and quality" and perishability, eliminating the statutory requirement that perishability is considered only where there is "actual or imminent deterioration" of those goods. (A-22-24).

The Seventh Circuit made it the petitioners' burden to show that admittedly physically indistinguishable eggs were *not* properly subject to distressed sale as specials by Rose Acre. (A-22). The court states that petitioners' expert somehow "needed to account for the fact that some, perhaps most, of the specials were not 'like' eggs sold on long-term contract . . ." even though " 'special' eggs as delivered may be physically indistinguishable to

[3] *Egg Industry*, at 20-22 (Nov.-Dec. 1989).

the buyer. . . ." (A-23). This was Rose Acre's burden, not petitioners'.

Rose Acre's specials were, as Judge Easterbrook recognized, *exactly the same eggs that Rose Acre sold at its regular prices.* (Pet. at 20-22), and not occasional, temporary occurrences, but rather comprised one-third of Rose Acre's business, were guaranteed months in advance, and were not at all "special". The specials were offered not in response to any changing marketability, but as Rose Acre's discriminatory price scheme to market more eggs without across the board price cuts. (Pet. at 21 n.19).

The Seventh Circuit has made it the plaintiff's burden to prove that the perishability of identical grocery products—products actually possessed and sold by defendant—does not affect the "like grade and quality" prerequisite for price comparisons. After the decision below, defendant sellers, like Rose Acre, may slash prices to select customers on any perishable grocery product, regardless of whether a specific batch of goods is really spoiling or deteriorating, and the plaintiff will have the burden of locating proof negating any possible spoilage or deterioration. That turns the statute on its head and renders it useless to the agricultural industry it was enacted to protect.

**3. The "Fact-Sensitive" Smoke Screen and Price Discrimination.** Rose Acre's most pervasive attempt to defeat review presents the case as if this Court is being asked to examine "boxes" of records or a "series" of sufficient-evidence issues. Rose Acre admits that "both courts below" made "de novo" reviews and arrived at their own "evidentiary determinations." (Opp. at 13). The right to the jury trial and verdict were obliterated by such judicial "determinations" differing from the jury's and from one another. Most importantly, while Rose Acre

sought and benefited from improper post-verdict judicial fact-finding in both courts below, that fact-finding approach is inappropriate here and is used by Rose Acre to avoid and obscure the fundamental legal and policy issues involved in this case.

In addition to Rose Acre's purported fact "question" about perishability (*see supra* section 2), Rose Acre's *in terrorem* smoke screen about the other purported "fact-sensitive" issues can be removed readily:

(a) Rose Acre argues that the twenty or so pages of the Seventh Circuit opinion concerning harm to competition are "purely dictum," that the district judge "assumed" the jury had evidence to find price discrimination, and that the case turns solely on the Seventh Circuit's de novo evidentiary determination on price discrimination. (Opp. at 6 n.7, 17 n.12, 21). The proof of price discrimination was certainly not a basis of the district court's judgment n.o.v. The price discrimination question discussed de novo by Judge Easterbrook (A-21-23) has an answer that requires no box of documents and is irrefutable: Rose Acre had uniform base prices, which were not "long-term" deals, and base price changes were made uniformly at the same time for *all* customers.[4] Thus the "specials" in fact measured the occurrence and extent of discrimination; "mean" prices "blending" in the discriminatory specials were unnecessary to show the price discrimination; and the hypotheticals about when someone might have made (non-existent) long-term contracts fixing base prices were irrelevant.

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[4] *See* Pet. at 22-24 and references cited therein. For example: "Q. At the time that Rose Acre would implement a change in its basic price would new [pricing] letters go out to *all* of Rose Acre's customers? A. [by Rose Acre's Director of Marketing] Yes." (P.Ex. 103 at 9, 10/16/87 A.M., 116) (emphasis added).

Rose Acre has no answer to the existence of price discrimination and, therefore, responds only in the very generalities about "boxes of documents" that it condemns. (Opp. at 28-29). Judge Easterbrook erroneously assumed that long-term contracts locked in base prices causing them to vary depending on when the contract was made and, therefore, insisted on a blended price computation that was unnecessary to identify and measure the price discrimination here.[5]

The Seventh Circuit's skepticism about what it called "the formidable advantages a plaintiff enjoys under the Robinson-Patman Act" (A-23)—its view of the high desirability of a monopolistic recoupment "filter"—led it to engage in a de novo, hypothetical, and misguided special scrutiny of "price discrimination." (A-23). When the opinion below stated that because of those "advantages," "we are not disposed to stint on the demonstration" of price discrimination (A-23), it seems obvious that if the Robinson-Patman Act were viewed less hostilely—for example, if it were limited to firms with clear and present monopolistic recoupment power—then the panel would not have been "disposed" to make suppositions about the price discrimination proof.

(b) The Seventh Circuit expressly rejected Rose Acre's renewed attempt (Opp. at 13, 19) to create a judicial fact question about the existence of "oligopoly" or sufficient market concentration under *Utah Pie* or the Robinson-Patman Act (A-4, 18-19).[6] That Act's purpose, unlike the

[5] At oral argument Judge Easterbrook pressed plaintiffs' counsel to explain the proof of price discrimination, insisting: "But let's *assume* that the blended price matters." Tape of December 5, 1988 oral argument (emphasis added).

[6] In addition, substantial record evidence showed that the relevant markets are *not* national and that Rose Acre's ability to use

(Footnote continued on following page)

Sherman Act § 2 monopolization focus, is to catch "the weed in the seed." (Pet. at 12).

(c) As one writer observed, the "jury's verdict [in this case] required the Seventh Circuit to assume the truth of plaintiffs' evidence on costs and subjective intent," thus foreclosing the very fact arguments that Rose Acre erroneously presents to this Court to oppose granting certiorari. *See* Wall, *supra*, *Predatory Pricing*, 4 Antitrust at 41. The Seventh Circuit explicitly acknowledged the proof that Rose Acre's prices were below its average total costs (which are commonly similar to long-run incremental costs) and also below its average variable costs. (A-4, 19). Rose Acre admits that the district court decision "rest[ed] on different grounds." (Opp. at 14). Directly contrary to the district court, and in response to the primary focus of the plaintiffs' appeal, the Seventh Circuit agreed that the jury could properly find below-cost sales here that satisfied the Robinson-Patman Act. (A-4, 19).[7] Thus, it is fundamentally incorrect for Rose Acre to imply that in this case this Court would be addressing cost evidence or cost-standard choices and to argue that the Seventh Circuit "did not disturb" the district judge's below-cost "evidentiary determination" supporting his judgment n.o.v. (Opp. at 20).

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[6] *continued*

the specials to maintain discrimination between areas reflected the existence of separate markets and market power. "Price discrimination in sales of the same product cannot last long in a competitive market" so that the persistent discrimination "shows that the seller has market power." 2 P. Areeda & D. Turner, *Antitrust Law*, ¶ 514a at 342 (1978).

[7] Rose Acre's cost-standard arguments (Opp. at 20 & n.15) are grossly wrong as well as irrelevant, since quite different methods were used to measure different costs such as "LRIC" and "AVC."

(d) Similarly, contrary to Rose Acre's argument (Opp. at 14, 19), this Court is not being asked to review the sufficiency of the evidence of actual predatory intent. The issue is whether actual predatory intent is relevant in any way. Thus, the Seventh Circuit unmistakably spoke of "[s]tripping intent away" (A-12) and ruled "that intent plays no useful role in this kind of litigation." (A-10; Pet. at 14-15).

In short, this petition is not about factual disputes. Unless this Court grants certiorari resolving the basic antitrust injury, perishability exemption, and price discrimination standards, the rulings here and the conflicts among the circuits will both deter and smother the rights of competing sellers under the Robinson-Patman Act.

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